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No. 82-376

In the Supreme Court of the United States

OCTOBER TERM, 1982

HOWARD WAITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL ~~COURT~~ CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's claim that he is entitled to additional years of credit on his civil service retirement account is barred by the statute of limitations.

TABLE OF CONTENTS

Page

Opinion 1

Jurisdiction 1

Statement 2

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Bruno v. *United States*, 556 F. 2d 1104 7

Friedman v. *United States*, 310 F. 2d 381, cert. denied *sub nom. Lipp* v. *United States*, 373 U.S. 932 ..... 3, 6

INS v. *Miranda*, No. 82-29 (Nov. 8, 1982) 6

Kirby v. *United States*, 201 Ct. Cl. 527 6

Lawn v. *United States*, 355 U.S. 339 4

Naton v. *Bank of California*, 649 F. 2d 691 6

Roberts v. *United States*, 151 Ct. Cl. 360 6

School District of Allentown v. *Marshall*, 657 F. 2d 16 6

Schweiker v. *Hansen*, 450 U.S. 785 ..... 5, 6

United States v. *Lovasco*, 431 U.S. 783 4

Statutes:

Federal Court Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 *et seq.* 1

28 U.S.C. 2501 3

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)[1]

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION

The order of the Court of Claims (Pet. App. A-8 to A-15) is not reported. The decision of the Civil Service Commission Board of Appeals and Review (Pet. App. A-1 to A-7) also is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 2, 1982, and a petition for reconsideration was denied on April 2, 1982. On June 16, 1982, the Chief Justice extended the time in which to file a petition for a writ of certiorari to August 30, 1982, and the petition was filed on that date.

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[1]The Court of Claims' appellate functions were merged into the functions of the new United States Court of Appeals for the Federal Circuit effective October 1, 1982. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 37-38, 57.

STATEMENT

Prior to his retirement in 1969, petitioner was a civilian employee of the Department of the Navy. In 1947, when petitioner was initially recruited by the Navy in Guam, there were no procedures established for the federal hiring of civilians on Guam. Accordingly, petitioner worked pursuant to employment contracts with private firms. In 1950, a Civil Service facility was established on Guam and petitioner was appointed to a federal position, which he held until June 15, 1963. From that date until March 22, 1965, petitioner was employed by the Government of American Samoa. Thereafter, petitioner served as a federal employee until his retirement in August 1969. When the Civil Service Commission computed petitioner's retirement pay, it did not give him credit for the periods 1947-1950 or 1963-1965 because it could not conclude that he had been a federal employee during those periods of time. Pet. App. A-9.

On January 23, 1970, the Bureau of Retirement, Insurance and Occupational Health of the Civil Service Commission denied petitioner's request for retirement credit for the period 1947-1950 (Pet. App. A-1, A-20 to A-21).[2] On July 22, 1970, the Civil Service Commission Board of Appeals and Review (now the Merit Systems Protection Board) (the "Appeals Board") affirmed on the ground that the evidence did not establish that petitioner was a federal employee during the period in question (*id.* at A-1 to A-7). The Appeals Board subsequently denied petitioner's request for reopening and reconsideration of his case (*id.* at A-26 to A-28). Petitioner continued to correspond with the Commission between 1971 and 1979, without obtaining satisfaction (Pet. 4-5; Pet. App. A-29 to A-64).

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[2]Petitioner had not sought review of the denial of credit for the period 1963-1965. See Pet. App. A-1, A-9 to A-10.

On July 30, 1981, petitioner filed this action in the Court of Claims seeking retirement credit for the 1947-1950 and 1963-1965 time periods.[3] The Court of Claims rejected this claim as barred by the six-year statute of limitations contained in 28 U.S.C. 2501, holding that all the events necessary to fix the liability of the United States occurred in 1969 and 1970 when the government excluded petitioner's service during 1947-1950 and 1963-1965 from its calculation of his annuity. The court further observed that although petitioner certainly could have brought suit after the Civil Service Commission denied his appeal in 1970, in fact suit was not filed until more than 10 years after petitioner's claims first accrued. The court also noted that petitioner's post-1970 efforts to persuade the Civil Service Commission to change its decision did not toll the statute, citing *Friedman* v. *United States*, 310 F.2d 381, 396 (Ct. Cl. 1962), cert. denied *sub nom. Lipp* v. *United States*, 373 U.S. 932 (1963). Pet. App. A-11.

In addition, the Court of Claims rejected petitioner's argument that his claims come within the "continuing claim" exception to the statute of limitations (Pet. App. A-12 to A-13). The court relied (*id.* at A-12) on *Roberts* v. *United States*, 151 Ct. Cl. 360, 363 (1960), as authority for "the narrow scope of that doctrine," which is applicable only to cases in which " 'there are no uncertain, undiscovered, or disputed facts' " (Pet. App. A-12). Because, the court found (*id.* at A-13), there are disputed questions of fact concerning petitioner's status during both periods of time for which he was not given credit, it concluded (Pet. App. A-12) that "[t]hese are precisely the kind of stale

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[3]Petitioner also sought payment for unused sick leave, which he forfeited upon retirement. The Court of Claims denied this claim on the merits (Pet. App. A-14), and petitioner is not seeking review of that aspect of the decision below.

claims the statute of limitations was intended to bar and the continuing claim exception is inapplicable."

ARGUMENT

The Court of Claims correctly applied settled law, and its decision presents no conflict with any decision of this Court or any court of appeals. Further review by this Court therefore is not warranted.

1. Petitioner's "basic" contention (Pet. 21-30) is that the government should be estopped from asserting the statute of limitations as a defense, because alleged "affirmative misconduct" on the part of the Civil Service Commission induced him to delay filing suit in federal court. But petitioner did not raise this estoppel argument below and he therefore should not be permitted to press it here. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958). In any event, the argument is without merit.

The alleged "affirmative misconduct" is nothing more than the Commission's January 15, 1971 letter denying petitioner's request for reopening and reconsideration of his case (Pet. App. A-26 to A-29). Specifically, petitioner contends (Pet. 29-30) that the letter misrepresented his appeal rights by stating that the Appeals Board's decision was final and that "there is no further right of appeal," but that the Commission could reopen the decision if new evidence were submitted.

The statements of which petitioner complains were made in the following context (Pet. App. A-26 to A-27):

> Decisions of the Commission's Board of Appeals and Review are final administrative decisions of the Civil Service Commission, from which there is no further right of appeal. However, it has been provided by regulation that the Commissioners may, in their

> discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:
>
> (a) New and material evidence is available that was not readily available when the previous decision was issued * * *.

Applying this standard, the Commission concluded (*id.* at A-28) that the materials petitioner had submitted did not warrant reopening. Read in context, the Appeals Board's statements were not misleading. Accordingly, they do not constitute affirmative misconduct under *Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

The unambiguous import of the quoted statements is that the decision of the Appeals Board is the final decision *of the Commission* and that no further *administrative* review is available to petitioner. This is clear not only from the express language of the statement—"[d]ecisions of the Commission's Board of Appeals and Review are final *administrative* decisions" (emphasis added)—but also from the context in which the statements were made—in response to petitioner's request for reopening and reconsideration *by the Commission* (see Pet. App. A-24 to A-25). Moreover, petitioner cannot show that the statements of the Commission or the lack of affirmative notification of the availability of judicial review caused him to "fail to take action, cf. *Montana* v. *Kennedy*, [366 U.S. 308, 314-315 (1961)], that [he] could not correct at any time." *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 789. Just as the statements of the Social Security Administration field representative in *Schweiker* v. *Hansen*, *supra*, did not prevent the claimant there from filing a written application for benefits, the Civil Service Commission's statements to petitioner did not prevent him from filing suit. The most that can be said is that those statements encouraged petitioner to attempt to persuade

the Commission to reopen and reconsider a decision that it had clearly stated was final. Accordingly, this case is governed by the principles announced in *Schweiker* v. *Hansen*, *supra*. See also *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982), slip op. 3-5.[4]

2. Petitioner also claims (Pet. 33) that the principle of "equitable tolling" should be applied "where a claimant diligently seeks to follow the procedures outlined by the agency." Both of the cases on which petitioner relies (Pet. 32-33), however, concerned federal provisions limiting the time within which a complainant must file an administrative notice of intent to sue a third party. In both cases, the courts held that such limitations periods are not jurisdictional, and therefore are subject to equitable modification. *School District of Allentown* v. *Marshall*, 657 F. 2d 16, 18 (3d Cir. 1981); *Naton* v. *Bank of California*, 649 F. 2d 691, 695-696 (9th Cir. 1981). Moreover, in neither case was the party whom the plaintiff sought to sue the United States or a federal agency. Accordingly, the cases cited by petitioner have no application to the statute of limitations involved here, 28 U.S.C. 2501, which is jurisdictional in nature and which represents a waiver of sovereign immunity. See, *e.g.*, *Kirby* v. *United States*, 201 Ct. Cl. 527, 539 (1973).

Indeed, the Court of Claims has repeatedly held that resort to permissive administrative remedies does not toll the running of the statute, because in those cases Congress "has [not] interposed an administrative tribunal between the claimant and the court." *Friedman* v. *United States*, *supra*, 310 F. 2d at 385, 388, 396; see also *Kirby* v. *United States*, *supra*, 201 Ct. Cl. at 531. Here, petitioner's attempts to gain reconsideration by the Commission were merely

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[4]Petitioner's "due process" argument (Pet. 33-34) merely restates his estoppel claim. It too was neither presented to nor decided by the Court of Claims.

permissive avenues of review. Accordingly, the Court of Claims correctly held (Pet. App. A-11) that the fact that petitioner wrote letters and submitted documents to the Civil Service Commission after 1970 in an attempt to persuade that agency to change its decision did not toll the statute.

3. Finally, petitioner contends (Pet. 34-35) that his post-1970 correspondence with the Commission operated to defer the finality of the Commission's prior adverse decision. This claim also lacks merit.

In *Bruno* v. *United States*, 556 F.2d 1104 (1977), the Court of Claims elucidated the deferred finality principles it had previously enunciated in *Friedman* v. *United States*, *supra*, on which petitioner relies (Pet. 35). The court explained *Friedman* as holding only that

> where the [administrative board] itself suggests in its findings that the decision is tentative, or where the [board] witholds a final decision pending consideration of some new evidence, or expressly invites, on the record, the petitioner [to] seek a reopening at some later date, then, as a matter of law, the [board] decision is not final and the statute of limitations does not begin to run. Absent such circumstances, the decision is final and the statute of limitations period begins to run.

556 F. 2d at 1106. The statements made by the Commission fall far short of these criteria. The Commission's January 15, 1971 letter to petitioner stated unambiguously that the Appeals Board's decision was final (see page 4, *supra*). The further recital that regulations granted the Commission discretion to reopen and reconsider prior decisions under certain exceptional circumstances was merely a prelude to the Commission's conclusion (Pet. App. A-28) that the material submitted by petitioner did *not* warrant reopening;

it certainly did not suggest that the decision rendered in petitioner's case was tentative or expressly invite petitioner to seek reopening at some later date.Nor did any subsequent communication to petitioner by the Commission do so (see *id.* at A-35 to A-37, A-39, A-42 to A-43, A-48 to A-50, A-54 to A-64). Accordingly, there is no basis for deferring the finality of the administrative decision challenged by petitioner.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

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[5]Petitioner's final contention (Pet. 36-39) consists of an argument on the merits, which the Court of Claims did not reach since it held that petitioner's claim was barred by the statute of limitations.

DOJ-1982-12